(2011) 06 MAD CK 0007

In the Madras High Court

Case No : T.C. (R) No. 941 of 2006

Sree Mannikandan Leathers APPELLANT

Vs

The State of Tamilnadu RESPONDENT

Date of Decision : 09-06-2011

Acts Referred:

Tamil Nadu General Sales Tax (Third Amendment) Act, 1959 — Section 3
Tamil Nadu General Sales Tax Act, 1959 — Section 12(5)

Citation : (2012) 47 VST 490

Hon'ble Judges : P.P.S. Janarathana Raja, J;Chitra Venkataraman, J

Bench : Division Bench

Advocate : V. Sundareswaran, for the Appellant; R. Sivaraman, Special Government Pleader (Taxes), for the Respondent

Final Decision : Allowed

Judgement

Chitra Venkataraman, J.—Assessee is on revision as against the order of the Sales Tax Appellate Tribunal by raising the following

substantial questions of law:

Whether in the facts and circumstances of the case, when the taxability of the portion in respect of the sale of entry 7(a) and 7(b) of Second

Schedule of Tamil Nadu General Sales Tax Act was not concluded, the imposition of penalty u/s 12(5)(iii) is legally sustainable?

2. The assessment herein relates to the assessment year 1992-93. The Petitioner is a dealer in hides and skins. The said Assessee claimed that it

purchased raw skins from the other states and tanned it and sold the same as finished leather inside the State. In the circumstances, it claimed that

finished leather and raw skin being one and the same commodity, the said turnover was exempted from payment of tax.

3. It is seen from the records placed before this Court that the Assessee filed a writ petition in WP. No. 17491 of 1992 before this Court

challenging its liability by questioning the vires of Section 3 of the Tamil Nadu General Sales Tax (Third Amendment Act) Tamil Nadu Act 31/87

(Amendment of Item 7 of II Schedule to Tamil Nadu Act I o 1959). While challenging, the Assessee also sought for an order of injunction

restraining the Assessing Authority from proceeding with the assessment pursuant to the proceedings of the second Respondent dated 25.9.1992.

In WMP. No. 24981 of 1992, an order of injunction was granted by this Court on 6.11.1992. The injunction granted was subsequently vacated in

the year 1996 by reason of the dismissal of the writ petition by this Court. The Assessee submits that immediately thereupon, it filed SLP before

the Supreme Court, which was also in turn rejected by the Apex Court. In the meantime, the assessment proceedings were completed and an

order of assessment was passed on 29.11.1996. The Assessee is stated to have paid the tax to the tune of Rs. 32,583/- on 18.1.1997.

Subsequently thereto, a notice was issued proposing to levy penalty u/s 12(5)(iii) of the Act for the non disclosure of the turnover in the return and

an order of penalty was passed on 31.3.1999 for a sum of Rs. 48,879/-. Aggrieved by the said penalty levy, the Assessee filed an appeal before

the Appellate Assistant Commissioner, who cancelled the levy of penalty by taking a view that there was no wilfulness on the part of the Assessee

in not disclosing the said turnover in the return. Since the Assessee had shown the said turnover in question under the column of exemption and that

the Assessee had filed the writ petition before this Court questioning the validity of the liability and on coming to know about the decision of this

Court in rejecting the plea of the Assessee, the Assessee had also paid the tax, the first Appellate Authority set aside the levy of penalty, thereby

allowed the appeal. As against the same, the Revenue came on appeal before the Tamil Nadu Sales Tax Appellate Tribunal challenging the

cancellation of levy of penalty. In the course of appeal filed before the Tribunal, the Assessee took a plea on jurisdiction of the officer to levy

penalty by reason of limitation as provided u/s 12(5)(iii) of the Act that beyond the period of five years from the end of assessment year, the

jurisdiction to the levy of penalty was not there and hence, the levy was totally hit by Section 12(5)(iii) of the Act. The Tribunal rejected the plea of the Assessee on the aspect of limitation. However, on the aspect of merits of the cancellation of levy of penalty by the first Appellate Authority, the

Tribunal however set aside the same and confirmed the levy of penalty. In the circumstances, present revision by the Assessee.

4. The facts as regards the assessment year, provision of law, injunction obtained before this Court on a challenge made to the amended act in the

year 1992 and the order passed by this Court in the year 1996 are all not in dispute. So too the facts that the Assessee had paid the tax pursuant

to the assessment order is also not in dispute. The Revenue is also not disputing that the turnover in question, which was basis for levy of penalty

was available in the books of accounts and was shown in the exempted column in the return filed by the Assessee. The Revenue however took a

plea that since the claim of exemption was not sustainable in law, the return filed by the Assessee is an incorrect turnover, which warranted levy of

penalty.

5. In a similar situation, this Court in the decision reported 94 STC 157 - State of Tamil Nadu v. Indian Silk Traders, considering the levy of

penalty, while taking the view that once an assessment is made on the basis of the books of accounts, for invoking the provisions of Section 12(5)

of the Act to levy penalty, the element of deliberateness, wilfulness or blameworthy conduct on the part of the Assessee may not be necessary. The

bona fides of the Assessee have to be gone into before imposing penalty. In so holding, this Court held that the guidelines given by the Supreme

Court in Cement Marketing CO. of India Ltd v. Assistant Commissioner of Sales Tax (1980) 45 STC 197 have to be kept in mind by the

Assessing Authority.

6. Applying the said decision to the admitted facts herein, given the fact that the Assessee was under the bonafide impression as regards the liability

of the turnover claimed as exempted in the return, and that it is not the case of the Revenue that the said turnover is not shown in the return, we

have no hesitation in applying the law declared by this Court in the above cited decision to the facts herein. In the circumstances, the turnover

disclosed the return could not be lost sight of while considering the plea of the Assessee as regards the bona fide claim to levy penalty.

7. In the light of the facts thus seen that the turnover in question was shown in

the exemption column and that the Assessee was under the bonafide

impression as to its liability, we have no hesitation in setting aside the order of the Tribunal.

8. On the question of plea of limitation in respect of levy of penalty, learned Counsel for the Petitioner submitted that he is not pressing the issue. In

the light of the order passed by us in setting aside the order of the Tribunal, we do not think, it is necessary for us to go into the aspect of limitation.

9. In the result, the Tax Case Revision is allowed. No costs.

